MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–875 OF 1999
GOPAL SRI RAM, ARIFIN JAKA AND AUGUSTINE PAUL JJCA
22 NOVEMBER 2004

Hire Purchase — Construction of agreement — Hirer in arrears of payment — Right of owners to repossess — Vehicle not within ambit of Hire Purchase Act 1967 — Whether agreement void — Whether vehicle can be repossessed

Hire Purchase — Vehicle not within ambit of Hire Purchase Act 1967 — Whether common law applicable — Civil Law Act 1956 s 3(1)(a)

Respondents had agreed to purchase a Merlo Panaronic EVS P 30 7 with registration number CAR 5886 ('the vehicle') from Avian Engineering Malaysia Sdn Bhd ('Avian') and had paid a deposit of RM35,000 by two cheques dated 21 October 1996 and 4 November 1996. As they were unable to pay the balance of the purchase price they approached the appellants for a loan for which purpose they filled up a form entitled 'Application for Hire Purchase Finance'. The vehicle was registered in the name of the respondents on 18December 1996 with an ownership claim by the appellants. The parties entered into the agreement on 23 December 1996 and on the same day the appellants paid the sum of RM160,000 to Avian. The Schedule to the agreement states the cash price of the vehicle as RM196,326 less an initial payment of RM36,326 leaving a balance of RM 160,000 together with interest to be paid by the respondents to the appellants in 59 monthly rentals. As the respondents defaulted in the payment of the rentals the appellants repossessed the vehicle. The respondents had commenced proceedings against the appellants by way of an originating summons in the High Court seeking for orders, *inter alia* that: (1) the hire purchase agreement ('the agreement') entered into between them in respect of the vehicle is outside the scope of the Hire Purchase Act 1967 ('the Act') thereby rendering it void; (2) the agreement is a bill of sale; and (3) for the vehicle, which had been repossessed, to be returned to them. The learned High Court judge held that the agreement is not a hire purchase agreement and is therefore void and of no effect. He further held that the repossession of the vehicle by the appellants is invalid as it was based on an invalid hire purchase agreement. Accordingly, he ordered that the vehicle be returned to the respondents. Hence, the appellants appealed to this court against the orders made by the judge.

Held, allowing appellant's appeal with costs:

(1) The affidavits of the respondents reveal that they negotiated with the appellants for a loan as they could not pay the balance of the purchase

price. On the day the agreement was executed the appellants had paid Avian the sum of RM160,000. This was followed by the endorsement of the ownership claim to the vehicle by the appellants in the registration card. The appellants have established their claim to the vehicle (see para 11).

(2) Clearly the parties had acted on the agreed assumption that payment to Avian would suffice for the purpose of consideration required by cl 2 of the agreement. It would be unjust to allow the respondents to go back on the assumption pursuant to the operation of what is called estoppel by convention (see para 12).

(3) Even if it can be successfully argued that there can be no estoppel in this case and that cl 2 of the agreement must be construed literally, there is an express provision in the agreement providing for a remedy when there is a failure to pay the initial payment to the appellants. That provision is cl 5 of the agreement. Pursuant to this clause the agreement is not invalidated where there is default in paying, *inter alia*, the initial payment but, instead, the appellants are entitled to terminate the hiring and take possession of the vehicle. The agreement is therefore not invalid (see para 14 dan 15).

(4) The respondents were fully aware of the nature of the transaction they were entering into. They had deliberately, and with a clear understanding of what they were doing, entered into a genuine hire purchase agreement having complied with the required formalities. The agreement is therefore not a bill of sale (see para 20).

(5) Even though the agreement does not fall within the ambit of the Act (not within the first schedule) and is also not a bill of sale it is a valid hire purchase agreement under the common law. The repossession of the vehicle was done by the appellants in accordance with the terms of the agreement and is lawful (see para 24).

[**Bahasa Malaysia summary**

Responden-responden telah bersetuju untuk membeli sebuah Merlo Panaronic EVS P 30 7 dengan nombor pendaftaran CAR 5886 ('kenderaan tersebut') daripada Avian Engineering Malaysia Sdn Bhd ('Avian') dan telah membayar wang pendahuluan RM35,000 melalui dua cek bertarikh 21 Oktober 1996 dan 4 November 1996. Oleh kerana mereka tidak dapat membayar baki harga belian, mereka telah bertemu perayu-perayu untuk satu pinjaman dan bagi tujuan itu mereka telah mengisi borang bertajuk 'Application for Hire Purchase Finance'. Kenderaan tersebut telah didaftarkan atas nama responden-responden pada 18 Disember 1996 yang mana pemilikan boleh dituntut oleh perayu-perayu. Pihak-pihak telah memasuki satu perjanjian pada 23 Disember 1996 dan pada hari yang sama perayu-perayu telah membayar sejumlah RM160,000

kepada Avian. Jadual kepada perjanjian tersebut menyatakan harga tunai kenderaan tersebut sebagai RM196,326 yang telah dikurangkan dengan bayaran pendahuluan sejumlah RM36,326 meninggalkan baki sejumlah RM160,000 berserta faedah yang perlu dibayar oleh responden-responden kepada perayu-perayu dalam 59 sewa bulanan. Memandangkan responden-responden telah gagal membuat pembayaran sewaan, perayu-perayu telah menarik balik kenderaan tersebut. Responden-responden telah memulakan prosiding terhadap perayu-perayu melalui satu saman pemula di Mahkamah Tinggi memohon, antara lain, bahawa: (1) perjanjian sewa beli ('perjanjian tersebut') yang dimasuki antara mereka berkaitan kenderaan tersebut adalah di luar skop Akta Sewa Beli 1967 ('Akta tersebut') dan oleh itu ianya adalah tidak sah; (2) perjanjian tersebut adalah satu bil jualan; dan (3) kenderaan tersebut, yang telah ditarik balik, dikembalikan kepada mereka. Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa perjanjian tersebut bukan perjanjian sewa beli dan oleh itu tidak sah dan tidak berkuat kuasa. Beliau juga memutuskan bahawa penarikan balik kenderaan tersebut oleh perayu-perayu adalah tidak sah kerana ia berdasarkan perjanjian sewa beli yang tidak sah. Sewajarnya, beliau memerintahkan agar kenderaan tersebut dikembalikan kepada responden-responden. Justeru itu, perayu-perayu telah membuat rayuan ke Mahkamah Rayuan terhadap perintah-perintah yang dibuat oleh hakim tersebut.

Diputuskan, membenarkan rayuan perayu-perayu dengan kos:

(1) Afidavit responden-responden menunjukkan bahawa mereka telah berbincang dengan perayu-perayu untuk mendapat pinjaman kerana mereka tidak mampu membayar baki harga belian. Pada hari perjanjian tersebut disempurnakan, perayu-perayu telah membayar Avian sejumlah RM160,000. Ini diikuti dengan pengindorsan tuntutan pemilikan kenderaan tersebut kepada perayu-perayu dalam kad pendaftaran. Perayu-perayu telah membuktikan tuntutan mereka ke atas kenderaan tersebut (lihat perenggan 11).

(2) Adalah jelas pihak-pihak tersebut telah bertindak atas andaian persetujuan bahawa pembayaran kepada Avian akan terlaksana bagi tujuan balasan yang dikehendaki oleh fasal 2 perjanjian tersebut. Adalah tidak adil untuk membenarkan responden-responden menarik balik andaian tersebut berikutan operasi yang dipanggil 'estoppel by convention' (lihat perenggan 12).

(3) Walaupun dapat dibuktikan bahawa tiada estopel dalam kes ini dan fasal 2 perjanjian hendaklah ditafsirkan secara harfiah, terdapat peruntukan nyata dalam perjanjian tersebut yang memperuntukkan remedi jika berlaku kegagalan untuk membayar bayaran pendahuluan kepada perayu-perayu. Peruntukan yang dimaksudkan adalah fasal 5 perjanjian tersebut. Menurut fasal ini, perjanjian tidaklah terbatal kerana kegagalan membuat pembayaran, antara lain, bayaran pendahuluan tetapi, sebaliknya, perayu-perayu mempunyai hak untuk membatalkan penyewaan tersebut dan

mengambil milikan kenderaan tersebut. Perjanjian tersebut oleh itu adalah sah (lihat perenggan 14 dan 15).

(4) Responden-responden sedar akan sifat transaksi yang mereka masuki. Mereka dengan berhati-hati, dan dengan pemahaman yang jelas tentang apa yang mereka lakukan, telah memasuki satu perjanjian sewa beli tulen setelah mematuhi keperluan-keperluan yang dikehendaki. Perjanjian tersebut oleh itu bukan satu bil jualan (lihat perenggan 20).

(5) Walaupun perjanjian tersebut tidak terangkum dalam Akta tersebut (bukan dalam jadual pertama) dan juga bukan satu bil jualan, ianya satu perjanjian sewa beli yang sah di bawah 'common law'. Penarikan balik kenderaan tersebut telah dilakukan oleh perayu-perayu menurut terma-terma perjanjian dan adalah sah di sisi undang-undang (lihat perenggan 24).]

Notes

For cases on construction of agreement, see 7 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3432–3433.
For cases on hire purchase generally, see 7 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3401–3521.
For cases on hirer in arrears, see 7 *Mallal's Digest* (4th Ed, 2003 Reissue) para 3432.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331(refd)
BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70 (refd)
Goh Bak Tun v Kuching Port Authority [1986] 1 MLJ 408 (refd)
London County Council v Aylesbury Dairy & Co [1898] 1 QB 106 (refd)
Maas v Pepper (1905) AC 102 (refd)
Madell v Thomas & Co [1891] 1 QB 230 (refd)
McEntire v Crossley Bros Ltd [1951] 1 All ER 185 (refd)
Mohamed Mydin v Ramiah [1965] 1 MLJ 33 (refd)
North Central Wagon Co Ltd v Brailsford & Anor [1962] 1 All ER 502 (refd)
PN Pillay & Co Ltd v Kah Motor Co Ltd [1965] 1 MLJ 47 (refd)
Polsky v S & A Services (1951) 1 All ER 185 (refd)
Sajan Singh v Sardara Ali [1960] MLJ 52 (refd)
Snook v London & West Riding Investments Ltd [1967] 1 All ER 518 (refd)
Thambipillai v Borneo Motors (M) Ltd [1970] 1 MLJ 70 (refd)

Legislation referred to

Bill of Sale Act 1950 s 4
Civil Law Act 1956 s 3(1)(a)
Contracts Act 1950 s 64
Hire Purchase Act 1967 s 1(2)

Appeal from: Originating Summons No D5–24–359 of 1998 (High Court, Kuala Lumpur)

S Vengadeswaran (Syarikat Kam Woon Wah) for the appellants.
Dato' B P Vendargon (Vendargon & Partners) for the respondents.

Augustine Paul JCA (delivering judgment of the court):

[1] The respondents (the plaintiffs in the court below) had commenced proceedings against the appellants (the defendants in the court below) by way of an originating summons seeking for orders, inter alia, that the hire purchase agreement ('the agreement') entered into between them in respect of a Merlo Panaronic EVS P 30 7 with registration number CAR 5886 ('the vehicle') is outside the scope of the Hire Purchase Act 1967 ('the Act') thereby rendering it void; that the agreement is a bill of sale; and for the vehicle, which had been repossessed, to be returned to them. The learned High Court judge ('the learned judge') held that the agreement is not a hire purchase agreement and is therefore void and of no effect. He further held that the repossession of the vehicle by the appellants is invalid as it was based on an invalid hire purchase agreement. Accordingly, he ordered that the vehicle be returned to the respondents. The appellants have appealed to this court against the orders made by the learned judge.

[2] The facts of the case reveal that the respondents had agreed to purchase the vehicle from Avian Engineering Malaysia Sdn Bhd ('Avian') and had paid a deposit of RM35,000 by two cheques dated 21 October 1996 and 4 November 1996. As they were unable to pay the balance of the purchase price they approached the appellants for a loan for which purpose they filled up a form entitled 'Application for Hire Purchase Finance'. The vehicle was registered in the name of the respondents on 18 December 1996 with an ownership claim by the appellants. The parties entered into the agreement on 23 December 1996 and on the same day the appellants paid the sum of RM160,000 to Avian. The Schedule to the agreement states the cash price of the vehicle as RM196,326 less an initial payment of RM36,326 leaving a balance of RM160,000 together with interest to be paid by the respondents to the appellants in 59 monthly rentals. As the respondents defaulted in the payment of the rentals the appellants repossessed the vehicle.

[3] In light of the orders made by the learned judge and the submissions advanced before us we considered it necessary to address our minds to the following issues:

(a) The validity of the agreement
(b) Whether the agreement is a bill of sale
(c) If the agreement is not a bill of sale its legal effect

[4] We shall now consider the three issues.

(A) THE VALIDITY OF THE AGREEMENT

[5] In dealing with the validity of the agreement the learned judge referred to its cl 2 ('cl 2') which reads as follows;

> On signing the agreement the hirer shall pay the owner the amount of the initial payment (which shall become the property of the owner absolutely) specified in the schedule hereto in consideration of the option to purchase herein contained and thereafter shall pay the rentals set out in the said schedule so long as the hiring shall continue…

[6] The learned judge summarised the submission made before him by learned counsel for the respondents in his grounds of judgment in the following terms:

> According to him, the option to purchase under cl 2 above is only effective and valid if the plaintiff had furnished consideration for the same to the defendant by paying over the initial payment direct to the defendant as provided for in the said cl 2. He contends that cl 2 is invalid, having regard to the factual circumstances as disclosed in affidavits which can be described as follows: that the plaintiff intended to purchase the said CAR 5886 from Avian Engineering Malaysia Sdn Bhd (the dealer) apparently for an agreed price of RM196.326; that he made the initial payment to the dealer on 21 October 1996 and 4 November 1996 amounting to RM350 after which the said CAR 5886 was delivered to him on 15 November 1996; that the plaintiff thereafter approached the defendant for a loan to settle the balance of the purchase price to the dealer and which loan was granted by the defendant upon the execution of the said Agreement on 23 December 1996. These facts have not been disputed.

[7] He then correctly identified the salient features of a hire purchase agreement. As he said in his grounds of judgment:

> A hire purchase agreement, at common law, is regarded as a form of contract whereby the owner lets goods out on hire and agrees that the hirer may either return the goods and terminate the contract or elect to buy the goods on the completion of the required periodic payments. A common characteristic feature of such an agreement is that the hirer has the option of purchasing the goods. And throughout the period of hire purchase, title to the goods remains with the owner. Therefore, unlike a sale of goods, no title to the goods passes from the owner to the hirer during the period of hire.

[8] In ruling that the agreement is invalid as it is not a hire purchase agreement the learned judge said in his grounds of judgment:

> Given the factual scenario above, two factors have clearly emerged: (1) that at the material time of the transaction between the plaintiff and the dealer in respect of the purchase of the said CAR 5886, the defendant was a stranger as the said Agreement only came into existence on 23 December 1996; (2) that at the time of the execution of the said Agreement on 23 December 1996, the title to the said CAR 5886 and therefore its ownership would have been vested in the plaintiff

since the plaintiff had, as I have said, made the initial payment as part-payment of the purchase to the dealer on 21 October 1996 and 4 November 1996 respectively and had also taken delivery of the same on 15 November 1996. That being the position, the defendant would have no title or ownership in the said CAR 5886 at the time when the said Agreement was executed on 23 December 1996 nor was there any consideration for the option to purchase by the plaintiff as the material time. In the absence of such an essential characteristic or feature, the said Agreement could not be regarded as a real hire purchase agreement. In my view, the facts and evidence as disclosed in affidavits do not support cl 2 of the said Agreement and therefore it is void and of no effect whatsoever. In the circumstances, I hold that the said Agreement is not actually a hire purchase agreement and as such is invalid. I also hold that the repossession of the said CAR 5886 by the defendant is invalid as it was based on an invalid hire purchase agreement. I order that it be returned to the plaintiff accordingly.

To the extent stated, I will allow the application with cost. Let me add that notwithstanding the above decision, the defendant is of course at liberty to take whatever appropriate action it deems fit to recover the loan in question.

[9] The learned judge was therefore of the view that the agreement is invalid as the appellants would not have had any title or ownership of the vehicle at the time of its execution on 23 December 1996 as it would have vested in the respondents by virtue of them having made the initial payment followed by taking possession of the vehicle and as no consideration was paid by the respondents direct to the appellants with regard to the option to purchase as envisaged by cl 2.

[10] It is settled law that in order for the agreement to qualify as a valid hire purchase agreement the appellants must have been the owners of the vehicle at the time of its execution. A description of them as the owners in the agreement is not conclusive of the status. That was made manifestly patent in the instructive judgment of this court in *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70. Neither can it be said that the fact that the vehicle has been registered in the name of the respondents means that the title to it could not have passed to the appellants. In considering the meaning of the word 'owner' Tan Chiew Thong J said in *Goh Bak Tun v Kuching Port Authority* [1986] 1 MLJ 408 at p 410:

In this connection, the Oxford English Dictionary defines 'owner', *inter alia*, as one who owns or holds something as his own; a proprietor; one who has the rightful claim or title to a thing (though he may not be in possession).

[11] The definition of 'owner' therefore includes a person who has a rightful claim or title to a thing. This raises the question of whether the ownership claim to the vehicle by the appellants makes them the owners of the vehicle even though it is registered in the name of the respondents. It must be remembered that the registration card is not a document of title (see *Sajan Singh v Sardara Ali* [1960] MLJ 52; *Mohamed Mydin v Ramiah* [1965] 1 MLJ 33).

This means that even though a motor vehicle remains registered in the name of a seller it does not prevent the property in it passing to a buyer who has purchased it. It depends on the facts of a particular case. It follows that the title to the vehicle can still pass to the appellants even though it is in the name of the respondents. In our view the conclusion of the learned judge on the ownership of the vehicle is rather speculative. As he said in his grounds of judgment its ownership 'would' have vested in the respondents as they had paid the initial payment and had taken delivery of the vehicle on 15November 1996. We fail to understand how the initial payment made by the respondents could make them the owners of the vehicle on the facts of this case. The affidavits of the respondents reveal that they negotiated with the appellants for a loan as they could not pay the balance of the purchase price. On the day the agreement was executed the appellants had paid Avian the sum of RM160,000. This was followed by the endorsement of the ownership claim to the vehicle by the appellants in the registration card. In our view the appellants have established their claim to the vehicle. In the circumstances the endorsement of the ownership claim on the registration card of the vehicle means that the respondents cannot deal with the vehicle without the consent of the appellants as they have a claim or title to the vehicle. This makes the appellants the owners of the vehicle for all intents and purposes. The claim of the appellants will prevail over the interests of the respondents even though they are registered as the owners. It is therefore clear that the appellants were the owners of the vehicle at the time of the execution of the agreement.

[12] The next ground relied on by the learned judge in ruling that the agreement is invalid as a hire purchase agreement is that no consideration was paid for the option to purchase by the respondents as required by cl 2. This part of his judgment read with the submission of learned counsel means that no consideration was paid 'direct' to the appellants as envisaged by cl 2 since it had been paid to Avian. It cannot be disputed that cl 2 contemplates payment of the initial payment by the respondents 'direct' to the appellants. In our opinion it is inequitable for the respondents to raise this ground as an objection. Both parties were fully aware that the initial payment had been made by the respondents to Avian before the execution of the agreement. It has been recognised in the Schedule to the agreement as having been paid. Clearly the parties had acted on the agreed assumption that payment to Avian would suffice for the purpose of cl 2. It would be unjust to allow the respondents to go back on the assumption pursuant to the operation of what is called estoppel by convention. Such an estoppel arose in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577; a case cited with approval by Gopal Sri Ram JCA in writing for the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. In the former case the A Co negotiated with the X Bank for a loan to the B Co, a subsidiary of the A Co, for the purpose of acquiring and developing a property in the Bahamas. It was

agreed that the loan was to be secured by a mortgage on the property and also by a guarantee from the A Co. In the guarantee, the A Co promised the X Bank, in consideration of the Bank's giving credit to the B Co, to 'pay you all moneys due to you' from the B Co. This was an inappropriate form of words since the loan to the B Co was not made directly by the X Bank but by one of its subsidiaries, the Y Bank, with money provided by the X Bank: hence, if the guarantee were read literally, it would not apply to the loan since no money was due from the B Co to the X Bank. The English Court of Appeal took the view that this literal interpretation would defeat the intention of the parties, and held that, on its true construction, the guarantee applied to the loan made by the Y Bank. As Denning LJ said at p 585:

> Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete. It may be used so as to introduce terms and conditions into a contract which would not otherwise be there. If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.

[13] As Lord Denning further said:

> The parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to the dealing which have taken place between the parties.

[14] Clause 2 must therefore be varied to read as a reference to the initial payment made by the respondents to Avian. Be that as it may, even if it can be successfully argued that there can be no estoppel in this case and that cl 2 must be construed literally, there is an express provision in the agreement providing for a remedy when there is a failure to pay the initial payment to the appellants. That provision is cl 5 of the agreement. Pursuant to this clause the agreement is not invalidated where there is default in paying, *inter alia*, the initial payment but, instead, the appellants are entitled to terminate the hiring and take possession of the vehicle. In the circumstances it cannot be said that a failure to comply with cl 2 will invalidate the agreement. Furthermore, a failure to comply with a strictly construed cl 2 will result in a detriment, not

to the respondents, but to the appellants. If the appellants are not insisting on a benefit that is due to them it is difficult to comprehend how the respondents can use it as a ground to invalidate the agreement. The failure by the appellants to insist on their right to the consideration may only amount to a dispensation of it within the meaning of s 64 of the Contracts Act 1950. One would therefore expect the respondents to use the dispensation of the consideration as a shield if action is threatened to be taken against them by the appellants under cl 5 of the agreement and not as a sword to invalidate the agreement.

[15] The agreement is therefore not invalid. What now requires consideration is its nature and effect.

(B) WHETHER IT IS A BILL OF SALE

[16] If the agreement is a bill of sale it would be void as it has not been attested and registered as required by s 4 of the Bills of Sale Act 1950.

[17] A genuine hire purchase agreement will not be termed as a bill of sale. In *McEntire v Crossley Bros Ltd* [1951] 1 All ER 185 the House of Lords observed that hire purchase agreements are generally not considered bills of sale unless there is a sham. The guidelines for determining whether a hire purchase agreement is a bill of sale and therefore void for non-registration were summarised in clear terms in *North Central Wagon Co Ltd v Brailsford & Anor* [1962] 1 All ER 502. They are as follows:

(a) if a person deliberately, with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire purchase agreement, the agreement is not a bill of sale (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309; *British Railway Traffic & Electric Co v Kahn* (1921) WN 52);

(b) if the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will the more readily hold that the agreement is not a bill of sale (see *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* (1934) 2 KB 305));

(c) if the hire purchase agreement is a mere device to cloak a loan, the document is a bill of sale (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309);

(d) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (see *Polsky v S&A Services* (1951) 1 All ER 185);

(e) if the facts are not truly stated in the documents there is a circumstance tending to show that the documents are a mere cloak (see *Polsky v S&A Services* (1951) 1 All ER 185).

[18] What therefore requires to be considered is whether the agreement is a mere device to cloak a loan for which purpose it is permissible to look

behind the documents to discover its true nature. Thus the terms attached to the documents are immaterial as the court will look at the substance of the transaction to determine its nature. In order for an act or document to be a sham all the parties must have a common intention that the acts or documents are not to create the rights and obligations which they give the appearance of creating (see *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518). Thus each case must depend on its own facts (see *Maas v Pepper* (1905) AC 102). If in reality the document is only given as security for money then it is a bill of sale (see *Madell v Thomas & Co* [1891] 1 QB 230. *Polsky v S & A Services* (1951) 1 All ER 185 is a good illustration. In that case the plaintiff purchased a motor car for £895 and paid for it by cheque. In order to obtain some funds to pay into his bank to meet the cheque he approached the defendants, a finance company, who handed him £400 in return for his entering into a hire purchase agreement in respect of the car, which he notionally sold to the defendants before the execution of the hire purchase agreement. It was held that the transaction was merely a loan of £400 by the defendants to the plaintiff on the security of the car.

[19] The facts of this case as stated earlier reveal that the respondents had agreed to purchase the vehicle from Avian. As they could not pay the full purchase price they approached the appellants for a loan. The appellants paid the balance of the purchase price to Avian and entered into an agreement with the respondents with regard to the loan. The appellants also caused an endorsement of their ownership claim to the vehicle to be made on the registration card. In determining the purpose of the transaction we can do no better than refer to paras 5 and 6 of the respondents' affidavit affirmed on 30July 1998. They read as follows:

> 5 Saya mohon kebenaran mahkamah yang mulia merujuk kepada eks 'LPM 1' di mana mahkamah yang mulia akan memerhatikan bahawa tajuk Perjanjian yang berkenaan adalah Perjanjian Sewa-beli.
>
> 6 Saya dengan rendah diri menyatakan bahawa Perjanjian No: 2–0603–7–60290 (eks 'LPM 1') tidak laku dan sah daripada mulanya dan perjanjian berkenaan tidak boleh dikuatkuasakan oleh defendan terhadap plaintif dan/atau kenderaan No: CAR 5886 di antaranya atas sebab-sebab berikut.
>
> (a) Perjanjian Sewa-beli harga boleh dibuat terhadap barang-barang yang disenaraikan dalam pertama kepada Akta Sewa-beli. Jentolak tidak disenaraikan dalam jadual yang berkenaan pada setiap masa yang berkenaan.
>
> (b) Walaupun tajuk perjanjian yang berkenaan adalah perjanjian sewa-beli sebenarnya daripada sisi undang-undang perjanjian yang berkenaan dianggap sebagai satu Bill of Sale.

[20] There can therefore be no doubt that the respondents were fully aware of the nature of the transaction they were entering into. They had deliberately, and with a clear understanding of what they were doing, entered into a genuine

hire purchase agreement having complied with the required formalities. The agreement is therefore not a bill of sale.

[21] The resultant matter for consideration is the effect of the agreement as the vehicle does not come within the scope of the Act.

(c) THE LEGAL EFFECT OF THE AGREEMENT

[22] The Act was passed in 1967. Prior to the coming into force of the Act hire purchase transactions were executed in accordance with common law principles as demonstrated, for example, by *PN Pillay & Co Ltd v Kah Motor Co Ltd* [1965] 1 MLJ 47 and *Thambipillai v Borneo Motors (M) Ltd* [1970] 1 MLJ 70. Section 1(2) of the Act limits its applicability to certain categories of goods. It reads as follows:

> This Act shall apply throughout Malaysia and in respect only of hire purchase agreements relating to the goods specified in the First Schedule.

[23] The critical issue for determination is whether there can still be valid hire purchase transactions in respect of goods not in the First Schedule to the Act. The answer is provided by s 3(1)(a) of the Civil Law Act 1956 which enunciates that the court shall apply the common law of England and the rules of equity as administered in England on 7 April 1956 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia' The common law of England cannot therefore be applied in respect of goods specified in the First Schedule to the Act as provision has been made in respect of them. In the case of goods not in the First Schedule to the Act it only means that no provision has been made by any written law with regard to them. The common law will therefore continue to be applied to such goods. It follows that there can be valid hire purchase agreements in respect of goods not in the First Schedule to the Act. It would be appropriate for the parties to set out the terms and conditions governing the transaction in such hire purchase agreements. This may include even relevant provisions from the Act itself. It is not possible for them to agree to be bound by the Act as it, *inter alia*, regulates the rights and duties of the parties and provides for penal sanctions for non-compliance. In this regard reference is made to *London County Council v Aylesbury Dairy & Co* [1898] 1 QB 106 where Wright J said at p 109:

> Where an enactment may entail penal consequences no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

[24] Thus even though the agreement does not fall within the ambit of the Act and is also not a bill of sale it is a valid hire purchase agreement under the common law. The repossession of the vehicle was done by the appellants in accordance with the terms of the agreement and is lawful.

[25] In the upshot we allowed the appeal with costs here and below. Wefurther ordered that the deposit be refunded to the appellants.

Appeal allowed with costs.

Reported by AG Kalidas

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